No. 83-1012

In the Supreme Court of the United States

OCTOBER TERM, 1983

DAN BAGBEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court is obligated to rule prior to the defendant's testimony on a defense motion to restrict evidence that the prosecution might offer to rebut the defendant's expected testimony.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1983. The petition for a writ of certiorari was not filed until December 19, 1983, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and was sentenced to a term of four years'

imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 1a-15a).[1]

The evidence at trial, the sufficiency of which is not in dispute, is set out in the government's brief in the court of appeals (at 4-16). Briefly, it established that petitioner, a court officer in Westland, Michigan, met with various co-defendants, including Robert Cox, about the sale of quaaludes, marijuana, and cocaine. Although petitioner and Cox needed a pilot to fly large quantities of cocaine and marijuana into the United States from Colombia (*id.* at 5-6), they had access to a small amount of cocaine, a quarter-pound of which they delivered to co-defendant Anthony Berna for resale (*id.* at 6).[2] Berna delivered payment of $5700 for three ounces of cocaine to petitioner in an empty office at the Westland courthouse (*id.* at 8). Cox later acquired eight more ounces of cocaine, which he gave to Berna to sell (*id.* at 11). Berna met Cox and petitioner two days later and paid Cox approximately $8600 for about four ounces (*id.* at 12). Berna was arrested the next day when he met with an undercover agent to complete the sale of the remaining four ounces (*id.* at 13).

Prior to trial the government filed notice of its intent to offer for admission under Fed. R. Evid. 404(b) evidence of similar acts of misconduct committed by petitioner and co-defendants Halem, Mancini, and Catt within the dates of the charged conspiracy. The government did not specify what the particular acts were, but it proposed to make an offer of proof before it actually sought to introduce the evidence.

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[1] Petitioner was acquitted on a substantive count charging possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1).

[2] Berna pleaded guilty and testified for the government.

At trial, petitioner requested an advance offer of proof and a ruling on the admissibility of the proffered evidence prior to deciding whether to take the stand on his own behalf. Petitioner stated that if he testified he would acknowledge knowing several of his alleged co-conspirators socially and that he would then simply deny each allegation in the indictment. Accordingly, petitioner argued (Pet. 4), other acts of misconduct would be inadmissible because "none of the matters for which 'other acts' evidence might be allowed [would be] genuinely in issue" as a result of his testimony. In affirming his conviction, the court of appeals held (Pet. App. 3a) that petitioner was not entitled to an advisory ruling in advance regarding the admissibility of the prosecution's proposed rebuttal evidence and (*id.* at 4a) that, on the record made at the time of the request for the ruling, there was no basis for concluding in any event that such evidence would have been inadmissible.

ARGUMENT

Petitioner contends (Pet. 3-15) that he was improperly denied an advance ruling on the admissibility of evidence of other acts of misconduct to impeach him if he chose to testify at trial. The court of appeals, in a well-reasoned opinion (Pet. App. 2a-4a), properly rejected this claim.

1. We are not aware of any authority requiring a district court to rule in advance on an *in limine* motion such as petitioner's. On the contrary, the courts have held that it is generally within the trial judge's discretion not to rule on defense *in limine* motions. See *New Jersey* v. *Portash*, 440 U.S. 450, 462 n.1 (1979) (Powell, J., concurring); *United States* v. *York*, 722 F.2d 715 (11th Cir. 1984); *United States* v. *Luce*, 713 F.2d 1236, 1239-1240 (6th Cir. 1983) (citing cases), petition for cert. pending, No. 83-912;[3] *United States*

[3]The issue in *Luce*, in which we have acquiesced in the petition for a writ of certiorari, is entirely different from that here. The issue here is whether a trial judge is compelled to rule on a defendant's *in limine*

v. *Rivers*, 693 F.2d 52, 53-54 (8th Cir. 1982); *United States* v. *Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980); 608 F.2d at 1188 (Wallace, J., concurring); *id.* at 1190 (Kennedy, with Wright, Sneed, Choy, & Hug, concurring in part and dissenting in part); *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979). As the Sixth Circuit has pointed out, "[a] trial judge who declined to make a preliminary ruling on admissibility would be following a much safer course. If the defendant were to choose not to testify, no ruling need be made. If the defendant were to testify, the judge could rule on the impeachment after hearing the defendant's actual testimony." *United States* v. *Luce*, 713 F.2d at 1240.[4]

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motion that is purportedly made for the purpose of permitting the defendant to make an informed choice regarding whether he should testify. The issue in *Luce* is whether a defendant may contest the correctness of a ruling actually made on such a motion if he decides not to testify, purportedly in reliance on the ruling, and is subsequently convicted. Even if the Court were to hold that a defendant who does not testify may nevertheless contest the validity of the *in limine* ruling, it would by no means follow that a trial judge would lack discretion to decline to make such a ruling.

[4]One case holds that under certain limited circumstances an advance ruling may be required when a defendant moves *in limine* to exclude the use of his prior convictions for impeachment. In *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), the court of appeals recognized that "[i]n the usual case, the district court • • • has discretion to refuse to rule in advance of trial on the admissibility of impeachment evidence" (*id.* at 1285). The court then held, however, that the unique facts of that case brought it "so far outside the ordinary situation" that the district court had abused its discretion in declining to make an advance ruling on the *in limine* motion. The court also noted that "an advance ruling [excluding the proposed impeachment] in a case such as this does not prevent the trial court from reconsidering its decision if it appears necessary, in the interests of justice, to permit the impeachment" (*id.* at 1286 n.2).

The instant case does not fall within the narrow reach of *Burkhead*. As the Eighth Circuit later explained, *Burkhead* does not mandate an advance ruling where, as here, the trial court lacks the facts necessary to make "an informed decision." *United States* v. *Rivers*, 693 F.2d 52, 54 (1982).

2. Even if petitioner were entitled to an advance ruling, so that on appeal the case should be treated as though the motion *in limine* had been denied, the court of appeals was correct in concluding that such a denial would not have been error. Nothing in petitioner's proffer or the government's notice of intent to offer evidence under Fed. R. Evid. 404(b) provided grounds for granting petitioner's motion at the time it was made. As the court of appeals correctly pointed out (Pet. App. 4a), even if petitioner on direct examination had done nothing more than to deny his involvement in the charged drug activities, that testimony would have been sufficient to place in issue "his intent, or even involvement in a common plan, pattern or scheme." In denying the allegations of conspiracy and possession with intent to distribute, petitioner would have placed in issue his willfulness and specific intent to join in the conspiracy, as well as his knowledge, preparation, plan, and absence of mistake or accident. *United States* v. *Hamilton*, 684 F.2d 380, 384 (6th Cir.), cert. denied, 459 U.S. 976 (1982); *United States* v. *Lippner*, 676 F.2d 456, 461-462 (11th Cir. 1982). Additionally, depending perhaps on petitioner's precise testimony on direct examination, evidence of other acts might have been admissible to illustrate his relationship with his co-conspirators and to contradict his suggestion that all of his dealings with them were innocent. *United States* v. *Legendre*, 657 F.2d 238, 242 (8th Cir.), cert. denied, 454 U.S. 1037 (1981).

Indeed, even if petitioner had not testified at all, evidence of other crimes probative of the intent and knowledge needed for conviction of the charged offenses would appear to have been admissible in the government's case in chief. *United States* v. *Legendre*, 657 F.2d at 242; *United States* v. *Adcock*, 558 F.2d 397, 402 (8th Cir.), cert. denied, 434

U.S. 921 (1977).[5] Since the evidence in question was not in fact introduced by the prosecution at trial, and since its admission under Rule 404(b) would not depend on whether petitioner testified, it is difficult to see how petitioner could complain about the refusal to rule the evidence inadmissible in advance.

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[5]As the court of appeals noted (Pet. App. 3a), petitioner's reliance (Pet. 7-8) on *United States* v. *Ring*, 513 F.2d 1001, 1007-1008 (6th Cir. 1975) is misplaced. In *Ring*, the defendant raised a defense of amnesia and did not otherwise contest intent. In this case, petitioner's proffer that he would deny each allegation did nothing to eliminate intent as an issue. Similarly, neither *United States* v. *Benedetto*, 571 F.2d 1246 (2d Cir. 1978), nor *United States* v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979) (Pet. 9-10), supports petitioner's argument. In *Benedetto*, the court questioned the admission of similar act evidence to prove intent because intent was "not really in dispute" (571 F.2d at 1249). However, the court approved admission of the evidence to refute the defendant's testimony (*id.* at 1250). Here, there was some likelihood both that petitioner's testimony would have placed intent squarely in issue and that it would have opened the door for admission of the Rule 404(b) evidence under the precise rationale adopted in *Benedetto*. *Manafzadeh* likewise involved a defendant who did not contest intent. In that case, the majority noted that "any doubt about [the] nonexistence as an issue [of defendant's intent] was dispelled by the offer of the defendant to stipulate to the existence of the requisite intent if the other elements of the offense should be found" (592 F.2d at 87). The court also specifically rejected the probative value of the evidence of similar acts to show knowledge (because that was not an element of the charged offense), or to show plan or absence of mistake (because the other acts, which occurred after the charged offense, were not part of the same transaction or a continuing scheme). In this case, by contrast, not only was intent potentially at issue, but the similar acts took place at the same time and involved the same persons. Significantly, in *Ring*, *Benedetto*, and *Manafzadeh* the challenged evidence was actually admitted at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1984

DOJ-1984-03